STATE OF MICHIGAN

COURT OF APPEALS

DANA HADDAD,

Plaintiff-Appellant,

v

AMBER MANAGEMENT COMPANY, d/b/a AMBER APARTMENTS/TROY/ROYAL OAK, and PROFESSIONAL GROUNDS SERVICES, LLC,

Defendants-Appellees.

UNPUBLISHED
April 21, 2005

No. 250705
Oakland Circuit Court
LC No. 2002-044462-NO

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting summary disposition to defendants in this premises liability action. We affirm.

Plaintiff slipped on ice and fell as she was exiting a vehicle that pulled up next to the curb near an entrance to her apartment building. Defendant Amber Management Company (Amber Management) owns the premises. Plaintiff argues that the trial court erred in granting Amber Management's motion for summary disposition pursuant to MCR 2.116(C)(10) based on its finding that the condition that plaintiff encountered was open and obvious.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich. 1, 6; 615 NW2d 17 (2000); *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002). A possessor of land has a duty to exercise

reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp*, 464 Mich 512, 517-518; 629 NW2d 384 (2001). But where no such special aspects exist, the "openness and obviousness should prevail in barring liability." *Id.*

As a general rule, and absent special circumstances, the hazards presented by snow and ice are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). The danger presented by snow-covered ice is open and obvious where the plaintiff knew of, and under the circumstances an average person with ordinary intelligence would have been able to discover, the condition and the risk it presented. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004); *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002). Here, plaintiff described the condition as “frosted over snow, ice,” that was “white looking” in areas, which clearly implies that it was visible. Also, plaintiff testified that before the night of her fall, she was aware of a build-up of ice on a meter near the area of her fall. Moreover, plaintiff testified that there was no reason for her not to see the ice when she stepped out of the car, and she admitted that she did not look directly down when she stepped out of the vehicle. Even when viewing the evidence in the light most favorable to the plaintiff, the evidence demonstrates that a reasonably prudent person with ordinary intelligence would have been able to see the ice on casual inspection. For these reasons, the trial court did not err in finding that the condition encountered by plaintiff was open and obvious.

Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. Contrary to plaintiff's assertion, the danger presented by the presence of snow and ice in the area where she exited the vehicle was not unavoidable. Plaintiff could have alighted from the vehicle at the second entrance to the building that plaintiff also used when going to the parking lot.[1] The condition here is not the type of unavoidability intended by the Supreme Court in *Lugo*. The trial court properly granted summary disposition to defendant.

[1] No facts were presented to support a finding that the other entrance was in the same condition.

Plaintiff also argues that defendant knew or should have known of the icy condition on its premises. Because we conclude that the condition was open and obvious without special aspects, we need not reach the issue of notice.

Next, plaintiff argues that the trial court erred in granting summary disposition under MCR 2.1216(C)(8) in favor of defendant Professional Grounds Services (PGS). Plaintiff asserts that her claim against PGS is not based on its failure to perform but, rather, its negligent performance of its duties under the contract. We review de novo the trial court's grant of summary disposition based upon a failure to state a claim. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

In *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), our Supreme Court held that "in determining whether a negligence action based on a contract and brought by a third party to the contract may lie," the "threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations."[2] If no independent duty exists, there can be no tort action based on contract. *Id.* Accordingly, PGS contracted with Amber Management to remove snow and ice; it owed no duty to plaintiffs that was separate and distinct from its contractual obligations. Therefore, the trial court did not err in granting summary disposition to PGS.

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[2] *Fultz* noted that in previous decisions the Supreme Court and the Court of Appeals "have defined a tort action stemming from misfeasance (action) of a contractual obligation as the "violation of a legal duty separate and distinct from the contractual obligation." *Id.* at 467. The Court rejected this definition, and concluded that:

> the "separate and distinct" definition of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim. As there can be no breach of a nonexistent duty, the former misfeasance/nonfeasance inquiry in a negligence case is defective because it improperly focuses on whether a duty was breached instead of whether a duty exists at all.
>
> Accordingly, the lower courts should analyze tort actions based on contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie.
>
> Applying that analysis here, the Court of Appeals erred in affirming the jury verdict and in holding that "evidence suggested that [CML] engaged in misfeasance distinct from any breach of contract." [*Id.* at 467-468.]

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski